89-606

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JUDY HUBER,

Petitioner,

vs.

SIMON LEIS, SHERIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the First Amendment is violated when a deputy sheriff does not abide by a chain of command regulation and makes a complaint to the FBI that her son was mistreated in the course of his arrest by other deputy sheriffs, and where there is no evidence of disruption or adverse effect on the operations of the Sheriff's office as a result of the complaint.

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JUDY HUBER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Judy Huber, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The opinion and order of the United States District Court for the Southern District of Ohio (Rubin, D.J.) appears at 704 F.Supp. 131 (S.D. Ohio 1989). It is reprinted in the appendix hereto, p. 6a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 the petitioner brought this suit in the Southern District of Ohio on September 22, 1987. On January 4, 1989 the District Court granted respondent's motion for summary judgment which was based on a stipualated record. On August 31, 1989 the Sixth Circuit Court of Appeals affirmed the District Court's decision.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Judy Huber is a Deputy Sheriff of Hamilton County, Ohio. She is assigned to the Corrections Division.

On August 6, 1987 Ms. Huber's son was playing basketball with friends of his at the Colerain Elementary School in Cincinnati, Ohio. During a break in the game the school building was entered, and presumably set off an alarm. Deputy Sheriffs arrived at the scene and apprehended Petitioner's son. The other boys fled. In order to pursue the others, a Deputy Sheriff handcuffed petitioner's son to a fence where he remained while the Deputies pursued the others (R-1, Complaint).

Shortly after this incident on August 10, 1987, petitioner complained to the local Cincinnati F.B.I. office that her son's civil rights may have been violated by having been handcuffed to a chainlink fence (R-17, Final Pretrial Order, Sec. V, Agreed Facts). Ms. Huber did not comply with Sheriff's rule 1.20 which states that "any Sheriff's employee having a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor".

Subsequently, Ms. Huber and her son visited the F.B.I. office on August 12, 1987, and the son gave a firsthand account of his arrest to an F.B.I. agent. The single focus of the complaint was the handcuffing, and Ms. Huber made no charges that the Sheriff, himself, committed any wrongdoing, or that there were any widespread illegal practices. (R-17 Final Pretrial Order, Sec. V, Agreed Facts).

Sheriff Leis' agents on hearing of petitioner's complaint to the F.B.I., initiated an investigation that was conducted by a Sheriff's detective. The Detective concluded in a report of August 19, 1987 that Ms. Huber demonstrated a lack of professionalism by violating the Sheriff's Rule 1.20 which provides that "Any Sheriff's employee have a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor."

Thereafter on August 26, 1987 Petitioner was recommended to receive an official reprimand which was approved by Sheriff Leis on September 1, 1987. (R-1 complaint ¶¶6-7).

In the course of the proceedings in District Court Sheriff Leis once claimed that ". . . plaintiff's violation of Section 1.20 has had an adverse impact on discipline and morale within the Sheriff's office, and has caused unnecessary work and consternation for Deputies Fieler and Lantry, has needlessly burdened the F.B.I. and has undeservedly diminished the public's confidence in and image of the Hamilton County Sheriff's office". (R-13 Defendant's Memorandum Contra Plaintiff's Motion of Partial Summary Judgment, Affidavit of Simon L. Leis, Jr.). The respondent abandoned these allegations in Stipulation of Facts entered into for the purpose of the cross-motions for summary judgment. Instead, the Sheriff in the Stipulations stated that it was his "position" that the purpose of Sheriff's Rule 1.20 is to maintain discipline, high morale, etc. (R. 18 Stipulation of Facts for Cross-Motions for Summary Judgment ¶2).

There was no evidence or stipulation of any disruption or adverse effect on the Sheriff's operation because of Ms. Huber's complaint to the F.B.I.

Ms. Huber works in the Correctional Division. The Deputies about whom she complained worked in the Road Patrol Division (R-13 Defendant's Memorandum Contra Plaintiff's Motion for Partial Summary Judgment, Affidavits of Lantry and Feiler). Finally Ms. Huber does not have a close working relationship with the Sheriff. (R-18 Stipulations of Fact for Cross-Motions ¶6).

The District Court of the Southern District of Ohio determined that Ms. Huber's communication involved a matter of public concern because the citizens of Hamilton County are concerned with whether Sheriff's Deputies are conducting themselves lawfully in the performance of their duties. *Huber* v. *Leis*, 704 F.Supp. 131 (S.D. Ohio 1989). The court further noted that ". . . An exhaustive review of the record does not

reveal that plaintiff's inquiry to the FBI represents threats, abusive conduct, spite or any other frustration towards her colleagues or superiors. . . ." *Id.* p. 136. However, the District Court decided that a wide degree of deference should be accorded the public employer and that Ms. Huber's ". . . actions already have and further enhance the potential for undertermining the authority of the Sheriff. . . ." *Id.* p. 136.

In affirming, the Sixth Circuit stated in a *per curiam* opinion that ". . . assuming but without expressly deciding that the speech was constitutionally protected, we are nontheless of the opinion that in all events the balancing test between the exercise of protective speech, if such it was, and the interest of the Sheriff in the efficient performance by the employees of his department, decidedly favors the latter . . ." (Slip Opinion, p. 3-4, App. p. 4a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision authorizing punishment of a public employee for a private complaint to a law enforcement agency in the absence of any evidence of interference with the operations of the employer is contrary to decisions of this Court and not in accord with decisions of other Circuits.

A chain of command requirement, without more, cannot justify the punishment of a public employee's nonpublic complaint of unlawful activity to a law enforcement agency where there is no evidence of disruption or adverse affect on any governmental interest of the employer.

The lower court decisions cannot withstand the analysis and the holding of *Rankin* v. *McPherson*, ____ U.S. ____, 107 S.Ct. 2891 (1987). *Rankin* reaffirmed the principle that once it is determined that the communication is found to be on a matter of public concern, ". . . the State bears a burden of justifying the discharge on legitimate grounds. . . ." *Id.* 2898. *Rankin* then required *evidence* of an impingement of a governmental employer's interest, a *demonstration* that a state interest outweighs the employee's First Amendment rights. *Id.* 2899. Here there is no evidence of impingement, nor is there even an allegation that Ms. Huber's communication impinged on an employer interest.[1] Without such a showing a public employer has no power to preclude or control employee communications on subjects of public concern. Otherwise, speech would be totally at the discretion of the public employer. The balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) is not satisfied by mere assumptions. The employer must come forward and demonstrate that the statement ". . . impairs discipline by superiors or harmony among co-workers . . . or has a

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[1] There is neither a suggestion in the report of the Sheriff's Detective (R-1 Plaintiff's Complaint Ex. A & B), nor the reprimand itself that Ms. Huber adversely effected any employer interests identified in *Pickering*, *supra*.

detrimental impact on close working relationships . . . or impedes the performance of the worker's duties or interferes with the regular operation of the enterprise. . . ." *Id.* 570-573. And that does not end the matter. The court then may determine that the value of the speech outweighs the particular employer interest at issue.

The lower Courts below failed to adhere to *Connick* v. *Myers*, 461 U.S. 138 (1983). *Connick* involved a disgruntled Assistant District Attorney in an office of fifteen other attorneys. The attorney had an ongoing dispute with her employer. In the course of this she circulated a questionnaire of fourteen questions to her fellow attorneys which inquired of their confidence in their superiors, their morale, etc. All but one of the matters, the Court held, were nonpublic concerns. *Id.* 154. In addition, there was *evidence* that the disgruntled attorney was creating a "mini-insurrection" in the office. *Id.* 142. In light of those factors the Court stated

> When close working relationships are essential to fulfilling public responsibilities, a wide range of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationship is manifest before taking action. *We caution that a stronger showing may be necessary if the employer's speech more substantially involved matters of public concern. Id.* 153. (Emphasis added).

Here the District Court correctly found that

> . . . the public employee speech in the present case is substantially involved in matters of public concern and is therefore entitled to the highest level of protection. Plaintiff's speech was motivated by her belief that her son's constitutional rights were violated by Deputy Fieler on August 6. Clearly it is a matter of public concern to the citizens of Hamilton County that the Sheriff's

> deputies are conducting themselves lawfully in the performance of their duties. An exhaustive review of the record does not reveal that Plaintiff's inquiry to the FBI represents threats, abusive conduct, spite, or any other personal frustration toward her colleagues or superiors. This Court also notes as the Supreme Court did in *Pickering* that plaintiff's complaint was not directed at anyone she would be working with on a day to day basis.

Huber v. *Leis*, 704 F. Supp. at p. 135-136

Having found that the speech was clearly a matter of public concern,[2] the District Court and the Sixth Circuit failed to adhere to the caution of *Connick* v. *Myers*, *supra*, at 153, which became the holding in *Rankin*. Other Circuits have applied this injury-in-fact principle of *Rankin*.

In *Jungels* v. *Pierce*, 825 F.2d 1127, 1132 (7th Cir. 1987) speculation "concerning public perceptions and their impact," without evidence, was insufficient to overcome a plaintiff's First Amendment claim.

In *Brasslet* v. *Cota*, 761 F.2d 827, 846 (1st Cir. 1985) the court stated that detrimental impact must be objectively shown lest "public employers . . . promiscuously offer a subjective justification that could almost never effectively be rebutted." A town fire chief was held unconstitutionally discharged in retaliation for the exercise of his First Amendment rights in *Brasslet*. The fire chief whose previous work was

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[2] The trial court's finding that Petitioner's speech is a matter of public concern is supported by *McKinley* v. *City of Eloy*, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (Speech on competency of police force directed to public through city council meetings is a matter of great public concern); *McMurphy* v. *City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986) (Obviously, the public is concerned with how police department is operated and efforts to give public exposure to alleged misconduct are protected); and, *O'Brien* v. *Town of Caledonia*, 748 F.2d 403, 406-407 (7th Cir. 1984) (A policeman's rights must be vigilantly protected because he or she is extraordinarily able to inform the public of deficiencies in this important governmental department).

called commendable, *Id.* at 830, was fired because he had criticized the town's firefighting equipment and capabilities during a television interview. Reversing the lower court, the First Circuit said:

> The district court . . . obscured the values underlying the First Amendment and condemned the very type of public discourse that our Constitution actively seeks to preserve, even at a substantial cost to the government. That Brasslett's interview may have been somewhat critical of the Town or the Council hardly strips it of First Amendment sanction. The Amendment was calculated to protect precisely this type of speech, since it is likely that the government would be motivated to stifle only critical, revealing, or embarrassing remarks. *Id.* at 844.

Addressing the defendants' argument that the firing was necessary because of the trust needed between the employer and employee, the court in *Brasslet* said:

> [A]n employer may not be allowed to claim that his essential trust relationship with an employee was eroded solely by virtue of the employee's statements. *There must be an additional and independent showing of actual and significant harm.* *Id.* at 845-46.

Similarly, chain-of-command requirements such as Sheriff's Rule 1.20 have been held by other Circuits to be an insufficient justification by itself to suppress speech on public matters.

In a case very similar to that at bar, *Brockell* v. *Norton*, 732 F.2d 664 (8th Cir. 1984), the court held that a public employee who was discharged for failure to observe a chain of command policy was unconstitutionally deprived of his free speech rights. The plaintiff employee (Brockell) was a police department radio operator-dispatcher who discovered that a part-time officer improperly had a copy of the state's law en-

forcement standards examination. Brockell reported this information to the chief of police. Ten days later, Brockell made an anonymous phone call to the officer in charge of testing. *Id.* at 665. When the mayor and city council found out that Brockell made this call, they discharged him because he violated the police department's chain-of-command policy which required department business to be brought first to the chief of police and then, if not properly resolved, to the mayor. *Id.* at 665-6.

Brockell's First Amendment contention under 42 U.S.C. § 1983 was that his report to the officer in charge of testing was protected conduct under the balancing test from *Pickering*, and thus he could not be discharged under the city's chain of command policy. *Id.* at 666. The *Brockell* court agreed:

> A police department has a significant governmental interest in developing efficiency, loyalty, discipline, *espirit de corps*, and uniformity in its operations. . . . We cannot simply decide in the abstract, however, that a chain-of-command policy designed to protect this interest will always take precedence over the interest of a public employee in open communication. Rather, we must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy. *Id.* at 667.

Also important to the decision was that "this private call to an authority positioned to make a quick investigation and resolution of the alleged improprieties was less disruptive to the City and its police department than other forms of communication which Brockell might have chosen." *Id.* at 668.

Similar issues to those in the instant case were treated in *Czurlanis* v. *Albanese*, 721 F.2d 98 (3rd Cir. 1983) where the speech by a county employee at a public meeting of the county board alleging inefficiency and similar claims was pro-

tected and thus defendants were liable for suspending the plaintiff in retaliation for that speech. The appeals court reasoned that the plaintiff's speech was of significant public and not merely personal or private interest, and that the county's chain of command policy could not be used to justify the retaliatory action taken against him. *Id.* at 105.

The chain of command policy allegedly violated in *Czurlanis*, the court held, "cannot be used to justify the retaliatory action taken against Czurlanis under the rubric of the county's interest in promoting the efficiency of public service. It is simply incompatible with the principles that underlie the First Amendment to countenance a policy that would severely circumscribe in this manner speech on public issues, which occupies the 'highest rung of the hierarchy of First Amendment values.' " *Id.* at 105 (citation omitted).

Another case similar to that at bar, *Southside Public Schools* v. *Hill*, 827 F.2d 270 (8th Cir. 1987), was also decided in favor of plaintiffs on their First Amendment claims.

As the court in *Hill* stated, the issue was

> [W]hether appellees (Arkansas school teachers) were exercising constitutionally protected rights of free speech under the First Amendment when they complained about a colleague's deficiencies in implementing the programs provided by federal law for handicapped pupils, or where merely asserting a personal grudge or internal grievance over employment and working conditions which should have been processed through channels rather than by "going public" and sending a letter to the State Department of Education which resulted in an investigation disclosing certain defects in the school's procedures. *Id.* at 272 (footnotes omitted).

Affirming the lower court, the appellate panel held that the teachers' complaint was a matter of public concern and protected by the First Amendment. "[Plaintiffs] were not asserting a private grievance respecting employment or work-

ing conditions," thus *Connick* was not applicable. *Id.* at 273. "Nor were the [plaintiffs] prosecuting a personal vendetta or feud against [their colleague]." *Id.* As such, the adverse personnel actions taken against plaintiffs were in violation of their constitutional rights. *Id.* at 276.

In *O'Brien* v. *Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), a police officer criticized the dismissal of citations against lawbreakers in conversations with his attorney, the local District Attorney, The chief judge of the county court, the F.B.I., and the media. The Town of Caledonia required employees to observe a rule which said they must "treat as confidential the official business of the department."

The *O'Brien* court relied on its previous decision in *Hanneman* v. *Breier*, 528 F.2d 750, 755 (7th Cir. 1976), and held that the confidentiality rule violated the First Amendment as defendants had failed to show that the "state interest in confidentiality applicable on these facts [outweighed] the public and individual interests in the particular statement made." 748 F.2d at 407, *quoting Hanneman*, 528 F.2d at 754. The *Hanneman* rationale was:

> Of course, department discipline may be undermined when police officers disobey an official regulation and an express order not to disclose police business. The department's general interest in discipline alone, however, does not outweigh the individual and public interest in the subject of plaintiff's [disclosure]. 528 F.2d at 755.

The *O'Brien* court ruled that the public has a special interest in the dissemination of information in regard to the operation of its government, especially when one of its official leaders is suspected of corruption. As such, these communications are "deserving of vigilant protection by the First Amendment." 748 F.2d at 407-08.

The court in *O'Brien* further said that "[G]overnmental bodies may not restrict the flow of information to the public solely on considerations of discipline or internal operating procedures" *Id.* at 408.

CONCLUSION

The Sixth Circuit's decision is a very substantial incursion into what had been an area of protected speech by public employees. Previously, public employees had First Amendment protection to make non-disruptive, private complaints to law enforcement agencies about claimed illegal or improper activity in their workplace. The Sixth Circuit's decision now authorizes the punishment of these communications. This is not the rule in other Circuits, and is a misreading of the decisions of this Court.

Respectfully Submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 89-3052

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDY HUBER,
Plaintiff-Appellant,

vs.

SIMON LEIS, SHERIFF,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
(Filed August 31, 1989)

Before: ENGEL, Chief Judge; KEITH and MARTIN, Circuit Judges.

PER CURIAM. Plaintiff Judy Huber appeals an order of the United States District Court for the Southern District of Ohio granting summary judgment to the defendant, Sheriff Simon Leis, on her claim under 42 U.S.C. § 1983 that the Sheriff's reprimand of Huber following her complaint to the Federal Bureau of Investigaton (FBI) regarding the conduct of two deputy sheriffs violated her first amendment right of free speech.

Judy Huber is employed by the Hamilton County, Ohio Sheriff's Department as a deputy sheriff in the position of

Correction's Officer. On August 6, 1987, Huber's son was arrested by two deputy sheriffs for criminal trespass and resisting arrest. While the officers chased three other suspects, they left Huber's son handcuffed to a chain link fence. On August 10, Huber complained to the FBI that her son's civil rights were violated when the officer handcuffed him to the fence. Huber never consulted anyone in the Sheriff's office about the incident and her resulting complaint. The FBI subsequently ordered that the file on Huber's son be closed.

An investigation by the Sheriff's department determined that Huber had violated an internal rule of the office (Sheriff's Rule 1.20) which states:

> Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his supervisor.

On September 1, 1987, Sheriff Leis approved and issued a written reprimand to Huber for her violation of Sheriff's Rule 1.20. Huber filed this action on September 22, 1987 claiming that the reprimand violated her right to free speech under the first amendment. The parties subsequently submitted a stipulation of facts and agreed upon a final decision by the court upon cross motions for summary judgment without an oral hearing. The district court determined that although Huber was a public employee, her action in consulting the FBI was constitutionally protected because it involved a matter of public concern. He determined, however, that her interest in asserting her public concern did not outweigh the Sheriff's interest in avoiding the disruption of his office, undermining of his authority and destruction of working relationships and that therefore the Sheriff was entitled to summary judgment. Huber filed this timely appeal.

On appeal, Huber alleges that the district court properly determined that her speech touched on a public concern, but held that where there is no evidence that the speech would or did cause disruption or an adverse effect upon the government operation, the first amendment does not permit a repri-

mand of a public employee for such behavior. She further contends that Sheriff's Rule 1.20 is unconstitutionally vague and overbroad. Sheriff Leis counters that the district court reached the correct result for the incorrect reason. He contends that Huber's complaint to the FBI did not touch a matter of public concern because no first amendment concerns are involved here, since the communication was of a purely private nature, made by a mother on behalf of her son privately to the officer of another law enforcement agency than that to which she was a member. The Sheriff also urges with great persuasiveness that no speech or utterance was penalized by him, the penalty having been imposed solely for the non-performance of a duty imposed upon plaintiff by the sheriff's own regulations to report to her superiors any complaints involving other members of the staff of the sheriff's staff. Further, he contends that Sheriff's Rule 1.20 is not unconstitutional either on its face or as applied here.

A public employee's speech is protected when it involves "a matter of public concern." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Thus, as the Supreme Court observed in *Connick*, "when an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in response to the employee's behavior." *Id.* at 147. Whether speech is protected is a matter of law, *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984), but that determination is to be made only after the court has made "an independent examination of the whole record to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.* (quoting *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)). Once it is determined that a public employee's speech involved a matter of public concern, the court must then balance the employee's first amendment interest in expressing her views against the interest of the employer in "promoting

the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

Applying those principles to this case, counsel for Sheriff Leis makes a strong point that the complaint to the FBI here was an isolated one relating wholly to the personal concern of the plaintiff as a mother over the treatment given her son at the hands of another employee of the Sheriff's Department. No generalized policy or practice of constitutional violations is alleged to have been involved in the incident in question, nor did the plaintiff make or apparently desire to make any broader expression than the complaint to the FBI. Nonetheless, assuming but without expressly deciding that the speech was constitutionally protected, we are nonetheless of the opinion that in all events the balaneing test between the alleged exercise of protective speech, if such it was, and the interest of the Sheriff in the efficient performance by the employees of his department, decidedly favors the latter here. The intrusion upon the employee's right of expression was very slight, even viewed in the light most favorable to plaintiff. Sheriff's Rule 1.20 only required that she voice her concerns and her complaint about a fellow officer to the Sheriff whose ultimately responsibility it was to ensure the efficient and lawful operation of his staff. There is no showing that plaintiff here was forbidden from going to the FBI, but only that she was forbidden from communicating with the FBI without first having communicated the complaint to her immediate superior. Further, there was no allegation or showing that an observance of Sheriff's Rule 1.20 would have been futile had plaintiff sought relief through it on behalf of her son, nor is there any showing that the regulation itself was unreasonable or used as a means to cover up a general policy of illicit activity being carried on by the Sheriff's Department.

Finally, principles of efficient and honest law enforcement support the purposes of such a rule both in enabling the Sheriff to ferret out misconduct on the part of employees for whom he is responsible, and also as affording a means whereby disputes between officers in his department may be

promptly and effectively resolved with minimal damage to morale and to the good repute and standing in the community of the law enforcement agency itself.

Accordingly, the judgment of the district court is AFFIRMED.

Civil No. C-1-87-774

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUDY HUBER,

Plaintiff,

vs.

SIMON LEIS,

Defendant.

ORDER
(Filed January 4, 1989)

This matter is before the Court upon plaintiff's complaint filed pursuant to 42 U.S.C. 1983 seeking redress for the deprivation of plaintiff's rights under the First Amendment to the United States Constitution by requesting declaratory and monetary damages (doc. no. 1). The parties have agreed to submit this matter to the Court for final disposition upon cross motions for summary judgment without oral hearing.

This action was originally filed on September 22, 1987 (doc. no. 1). On April 13, 1988, plaintiff filed a motion for partial summary judgment (doc. no. 5). Such motion was opposed by defendant (doc. no. 13) with accompanying affidavits (doc. nos. 8, 9, 10, 11, 12) and also supported by plaintiff (doc. no. 15). On June 29, 1988, this Court denied plaintiff's motion for summary judgment since a genuine issue of material fact existed (doc. no. 16). Subsequently the parties entered into stipulations of fact for cross motions for summary judgment (doc. no. 18) and also referred to facts stipulated in the Final Pretrial Order (doc. no. 17).

This Court has carefully examined the exhaustive memoranda and documents which the parties have filed on the merits of the claims (doc. nos. 1, 5, 8, 9, 10, 11, 12, 13,

15, 17, 18, 24, 25, 26). In accordance with Federal Rule of Civil Procedure 52, the Court does set forth its Findings of Fact, Opinion and Conclusions of Law.

I. FINDINGS OF FACT

1. Plaintiff Judy Huber has been employed by the Hamilton County Sheriff's Office, as a deputy sheriff assigned to the Corrections Division for the past five (5) years and is currently holding the position of Correction's Officer.

2. Plaintiff's typical duties include searching incoming female detainees, taking fingerprints, checking arrest records in computer files, and such other administrative tasks.

3. Plaintiff is not responsible for any policy-making roles in the Sheriff's Office, nor does she have any public contact role other than answering routine phone calls. She refers any callers asking policy related questions to the appropriate supervisor.

4. Plaintiff does not represent the Sheriff's Office or Hamilton County in its relations with the press. She does not have a close working relationship with defendant Simon Leis, nor does she have access to confidential information of the Sheriff's Office.

5. Defendant Simon Leis (Simon L. Leis, Jr.) is and has been the duly appointed, qualified and acting Sheriff of Hamilton County, Ohio, since June 1, 1987.[1]

6. On January 1, 1987, the Hamilton County Sheriff's Office adopted the Hamilton County Sheriff's Office Rules, Regulations and Disciplinary Process. Section 1.20 ("Sheriff's Rule 1.20") reads as follows:

> Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his immediate supervisor.

7. Plaintiff became aware of the above-quoted Sheriff's Rule 1.20 on January 1, 1987.

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[1] In November 1988 Mr. Leis was elected Sheriff of Hamilton County.

8. On August 6, 1987 at approximately 1:50 a.m., plaintiff's son, Charles Hans, was arrested by Patrol Officer Michael H. Fieler and Sergeant Dennis M. Lantry of the Hamilton County Sheriff's Office for criminal trespass and resisting arrest at the Colerain Township Elementary School.

9. In order to participate in the search and apprehension of three (3) other suspects, Patrol Officer Fieler handcuffed Hans to a chain link fence.

10. Shortly after the arrest of Hans, Patrol Officer Fieler notified plaintiff, who was on duty at the Justice Center, of her son's arrest.

11. Plaintiff did not complain about the manner of her son's arrest to Patrol Officer Fieler, Sergeant Lantry, her immediate supervisor nor to defendant before approaching the FBI.

12. On or about August 10, 1987, plaintiff complained to FBI agent David Lichtenfeld at the local Federal Bureau of Investigation (FBI) office alleging that her son's civil rights were violated by Patrol Officer Fieler when he handcuffed Hans to the fence.

13. Agent Lichtenfeld advised plaintiff that she should discuss the matter with defendant. He further advised plaintiff that if she was not satisfied with defendant's resolution of the incident she could return with Hans to the FBI office for further discussion.

14. On or about August 12, 1987 plaintiff approached the FBI office a second time and discussed the arrest incident of August 6, 1987 with FBI agent Edward Woods.

15. Agent Woods reviewed the complaint with the local supervisory FBI agent in charge of civil rights matters. Based upon this review, Agent Woods was instructed to close the FBI file on the incident.

16. Plaintiff and her son did not allege to either Agent Lichtenfeld or Agent Woods that defendant Leis had in any way violated, participated in, or condoned the arresting officer's alleged violation of Hans civil rights, or that the arresting officer's alleged violation of Hans' civil rights was part of a pattern, custom, policy or practice of Hamilton County,

the Hamilton County Sheriff's Office, the Sheriff, or the employees of the Hamilton County Sheriff's Office.

17. Defendant Leis was personally unaware and unfamiliar with the apprehension and arrest of plaintiff's son on August 6, 1987, until after plaintiff registered a complaint to the FBI. Plaintiff has never discussed her son's arrest with defendant.

18. On or about September 1, 1987, defendant approved and issued a written reprimand to plaintiff after ascertaining that plaintiff had violated Sheriff's Rule 1.20.

II. OPINION

The issue before this Court involves an inquiry into the plaintiff's First Amendment Rights. It involves a two step process in which the District Court must first determine whether the plaintiff's speech addresses a matter of public concern. If the Court finds in the affirmative, it must then balance the public employee's rights of free speech in commenting upon matters of public concern against the interest of the state, as an employer, in promoting an orderly and efficient administration of public services performed through its employees. *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568.

The initial inquiry is whether plaintiff's speech can be characterized as constituting speech on a matter of public concern. The "expressly guaranteed freedoms" of the First Amendment share a common care purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575 (1980). It is well settled that a state cannot condition public employment on any basis that infringes upon the employee's constitutionally protected interest of freedom of expression. *Connick* v. *Myers*, 461 U.S. 137, 142 (1983); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Speech which is considered that of "public concern" is cer-

tainly afforded these constitutional guarantees. However, speech of public employees which may be characterized as *not* of "public concern" involves speech which deals with individual personnel disputes and grievances and other information which would be of no relevance to the public's evaluation of the performance of governmental agencies. *McKinley* v. *City of Eloy*, 705 F.2d 1110 (9th Cir. 1983). Thus, when employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intensive oversight by the judiciary in the name of the First Amendment. *Connick*, 461 U.S. at 146; *Garvie* v. *Jackson*, 845 F.2d 647, 650 (6th Cir. 1988); *McMurphy* v. *City of Flushing*, 802 F.2d 191, 196-197 (6th Cir. 1986). It should be forwarned that absent the most unusual circumstances, when a public employee speaks upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Connick*, 461 U.S. at 147. On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government is certainly meritorious of the highest degree of the First Amendment protection. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1946).

The Supreme Court prescribed a balancing method in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for determining when a public employee's speech addresses a matter of public concern. The trial court must make this determination as a matter of law on the basis of "the content, forum, and context of a given statement, as revealed by the whole record. *Connick* v. *Myers*, 461 U.S. at 147-188; *McMurphy* v. *City of Flushing*, 802 F.2d at 197.

Pickering made clear that educators should be able to speak out freely on educational questions of public concern. In that case, the Court held that a teacher could not be dismissed in retaliation for a letter publicly criticizing the School Board's

allocation of school funds and its methods of informing, or not informing, voting taxpayers of the reasons why additional tax revenues were being sought for the school system. The Court's professed goal was a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. In reaching its conclusion, the Court considered two factors; (1) Pickering's criticism was in no way directed toward anyone with whom he personally worked on a daily basis, and (2) that the subject on which Pickering commented, the school system's need for additional funds, was a question determined by popular vote and obviously a matter of public concern and interest. *Id.* at 569-70, 571.

By contrast, *Connick* v. *Myers*, 461 U.S. 138, (1983), presented a case in which an employee's criticism of her superior threatened to undermine authority and morale in a government workplace. Myers, an Assistant District Attorney, was dismissed based on her refusal to accept a transfer and also on her insubordination by circulating an office questionnaire regarding various matters, including office morale and pressure to work in political campaigns. Although the Court found that Myers' question regarding pressure to work in political campaigns touched on a matter of public concern, the Court balanced Myers' interest against the state's interest. It concluded that "The limited First Amendment interest involved here does not require that [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

The three most recent instructive cases on this issue in the United States Court of Appeals for the Sixth Circuit are *Mahronic* v. *Walker*, 800 F.2d 613 (6th Cir. 1986); *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986); and *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988).

Mahronic involved a situation where an employee of the Barren River Regional Mental Health-Mental Retardation

Board ("Board") aided in an investigation of Medicaid fraud occurring at the Board. Retaliatory conduct ensued by the Board's Executive Director and Mahronic was forced to resign. He filed a civil rights action under 42 U.S.C. § 1983 which ended in a settlement agreement. Mahronic then pursued alternative employment but encountered enormous defficulty, apparently from bad recommendations of his former employer. He subsequently filed a second action alleging that those recommendations were violations of both the settlement agreement and his First Amendment rights.

The United States Court of Appeals for the Sixth Circuit ultimately found that Mahronic's speech involving corruption in government to the Kentucky Attorney General was a matter of public concern and therefore protected by the First Amendment against any negative actions by his former employer.

The second of these cases is *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986) which involved among other matters, statements made by a police officer to a Police Chief and Police Lieutenant and then further made to persons outside the police establishment. The Sixth Circuit determined that in this instance these remarks to and about the Police Chief and Lieutenant were insubordinate and served no public purpose. Most of the officer's accusations, threats and abusive conduct toward his superiors were simply made in spite which the Court derived from the obvious overtones of personal frustration.

The final case addressing this issue is *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988). The plaintiff, Peter Garvie, Head of the University of Tennessee's Department of Speech, presented several concerns to the Provost regarding certain actions by the Dean of the Department. Although this case turned on the doctrine of qualified immunity, the United States Court of Appeals for the Sixth Circuit found that a department head's criticism of his superior's actions regarding the allocation of funds within a department, review of faculty grievances, and departmental votes on faculty nonretention were not matters of public concern. The record showed that

Garvie's criticisms more closely resembled an employee's complaints regarding his superior's actions.

In light of *Pickering* and its progeny, this Court finds that the public employee speech in the present case is substantially involved in matters of public concern "and is therefore entitled to the highest level of protection." Plaintiff's speech was motivated by her belief that her son's constitutional rights were violated by Deputy Fieler on August 6. Clearly it is a matter of public concern to the citizens of Hamilton County that the Sheriff's Deputies are conducting themselves lawfully in the performance of their duties. An exhaustive review of the record does not reveal that plaintiff's inquiry to the FBI represents threats, abusive conduct, spite or any other personal frustration toward her colleagues or superiors. This Court also notes as the Supreme Court did in *Pickering* that plaintiff's complaint was not directed at anyone she would be working with on a day to day basis.

Once speech is determined to be a matter of public concern, the Court must further balance the individuals First Amendment interest against the interest of the employer in conducting an orderly and efficient office maintaining authority and also close working relationships.

This Court has carefully considered the Sheriff's reasons and objectives in enacting Rule 1.20 which are the maintenance of strict discipline, high morale, first-rate job competence, and a unified effort at public service among all Sheriff's Office employees, thereby earning, projecting and maintaining a well-deserved positive public image of the Sheriff's Office and employees. It should be observed in passing that Rule 1.20 does not bar any expression by anyone, it only requires a consultation with a supervisor as an initial step to resolve internal conflicts.

Furthermore, as the Supreme Court emphasized in *Connick*, the matter of closeness of working relationships is a critical factor in the Court's determination. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. We do not see the necessity for an

employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationship is manifest before taking action. 461 U.S. at 151-52.

In this light this Court finds that the limited First Amendment interest involved here does not require that the defendant tolerate action which he reasonably believed would disrupt the office, undermine his authority and possibly destroy close working relationships. Plaintiff's actions already have and further enhance the potential for undermining the authority of the Sheriff. Finally, this Court notes that the action of the Sheriff was limited to a written reprimand and did not rise to any drastic level such as discharge from employment.

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1343 and the First Amendment to the Constitution of the United States.

2. A public employee's speech is constitutionally protected when it is characterized as speech on a matter of public concern. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Connick* v. *Myers*, 461 U.S. 138 (1983).

3. Speech is considered relating to a matter of public concern when it is directed toward any matter of political, social or other concern to the community. *Connick*, *supra*. Such a determination is made as a matter of law on the basis of the content, forum and context of a given statement as revealed by the whole record. *Connick*, *supra*.

4. Plaintiff Judy Huber's speech touched upon a matter of public concern as to the manner in which Sheriff's Deputies lawfully conduct themselves in performing an arrest.

5. If speech touches upon a matter of public concern, the Court must then balance the individual's First Amendment right against the employer's interest in maintaining an orderly, efficient and unified performance of public duties. *Connick*, *supra*.

6. In the instant situation, the interest of plaintiff Huber in asserting her public concerns does not outweigh the enactment and implementation of Sheriff's Rule 1.20 to avoid disruption of the office, undermine the Sheriff's authority, or destroy close working relationships.

In accordance with the foregoing and for the reasons contained herein, plaintiff Judy Huber's motion for summary judgment as to all claims in the complaint is hereby DENIED and defendant Simon Leis's motion for summary judgment as to all claims in the complaint is GRANTED.

It is so ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court

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CLERK

NO. 89-606

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JUDY HUBER,

Petitioner,

vs.

SIMON LEIS, SHERIFF,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a deputy sheriff's First Amendment rights are violated when the deputy sheriff is reprimanded for making a formal complaint to the FBI concerning the job performance of another deputy before making that complaint to her own supervisor as required by a facially valid regulation of the Sheriff's Department.

2. Whether the within unpublished decision of the United States Court of Appeals for the Sixth Circuit constitutes an incursion into the area of protected speech by public employees.

3. Whether the petition raises any important question that needs to be addressed by the court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

UNITED STATES CODE, TITLE 42, SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, RULE 24, PUBLICATION OF DECISIONS

(a) **Criteria for Publication.** The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;

iii) whether it discusses a legal or factual issue of continuing public interest;

iv) whether it is accompanied by a concurring or dissenting opinion;

v) whether it reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or,

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

vi) whether it addresses a lower court or administrative agency decision that has been published; or,

vii) whether it is a decision which has been reviewed by the United States Supreme Court.

(b) **Designation for Publication.** There shall be a presumption in favor of publication of signed and *per curiam* opinions. A signed opinion is one in which the author's name appears at the beginning of the opinion. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.

(c) **Citation of Unpublished Decisions.** Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case. If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The facts upon which the district court based its summary judgment decision herein are not disputed by the parties, having been stipulated to by the parties as a prerequisite for the filing of their cross-motions for summary judgment (Stipulation of Facts for Cross-Motions for Summary Judgment, opening paragraph on page one). As that document indicates, these stipulated facts are drawn from three different areas of the case record:

1) those facts stipulated to in Section V, paragraph A, of the Final Pretrial Order (at pages 3-6);

2) those facts alleged in the Complaint and Jury Demand which are admitted in the Answer of Defendant Simon Leis, Sheriff, Hamilton County, Ohio; and

3) those additional facts stipulated to by the parties in paragraphs 2, 4, 5 and 6 of the Stipulation of Facts for Cross-Motions for Summary Judgment.

For the convenience of this Court, these facts are set forth in their entirety as follows:

1) From Section V, Paragraph A of the Final Pretrial Order, at pages 3-6.

Respondent Simon Leis (Simon L. Leis, Jr.) is the duly appointed [now, the duly elected], qualified and acting Sheriff of Hamilton County, Ohio, and has served as such continuously from June 1, 1987, to date.

Petitioner Judy Huber has been employed by the Hamilton County Sheriff, as a deputy sheriff assigned to his Corrections Division, for over five (5) years. Her current position is that of Correction Officer.

On January 1, 1987, the Hamilton County Sheriff adopted the Hamilton County Sheriff's Office Rules, Regulations and

Disciplinary Process, Section 1.20 (*"Sheriff's Rule 1.20"*) which reads as follows:

> **"SECTION**
>
> **1.20** Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his immediate supervisor."

Petitioner became aware of the above-quoted *Sheriff's Rule 1.20* on January 1, 1987.

On August 6, 1987, at approximately 1:50 a.m., Petitioner's son, Charles Hans, was arrested by Patrol Officer Michael H. Fieler and Sgt. Dennis M. Lantry of the Hamilton County Sheriff's Office, for criminal trespass and resisting arrest, at the Colerain Township Elementary School.

In order to participate in the search for and apprehension of the other three (3) suspects, Patrol Officer Fieler handcuffed Petitioner's son to a chain-link fence.

Shortly after the arrest of Petitioner's son, Patrol Officer Fieler notified Petitioner, who was on duty at the Justice Center, of her son's arrest.

Petitioner did not complain about the manner of her son's arrest to Patrol Officer Fieler or to Sgt. Lantry, nor did she consult about it with her immediate supervisor, nor did she discuss it with Respondent, before complaining about it to the FBI.

Petitioner did not comply with *Sheriff's Rule 1.20* before complaining to the FBI.

Petitioner complained to the local FBI Office, alleging that her son's civil rights were violated by Patrol Officer Fieler when he handcuffed her son to the fence as described above.

Petitioner first complained to FBI Agent David Lichtenfeld on or about August 10, 1987.

FBI Agent Lichtenfeld advised Petitioner to discuss the

matter with Respondent. He further advised Petitioner that if she was not satisfied with Respondent's resolution of the matter, she could bring her son into the FBI office for further discussion of the incident.

Petitioner did not allege to FBI Agent Lichtenfeld either that Respondent had in any way violated, or participated in or condoned the arresting officer's alleged violation of, her son's civil rights, or that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of the Hamilton County Sheriff, his office, or his employees.

Petitioner brought her son into the FBI office on or about August 12, 1987, and made further complaint about his arrest on August 6, 1987, speaking this time with FBI Agent Edward Woods.

Petitioner's son related to FBI Agent Woods his version of the incidents involved in his apprehension and arrest by Hamilton County Deputy Sheriffs on August 6, 1987. FBI Agent Woods asked several questons regarding the incident to which either or both responded, as appropriate. The thrust of their complaint was that Petitioner's son's civil rights were violated by an arresting deputy sheriff because he handcuffed Petitioner's son to a fence during a search for other suspects. The interview was concluded after approximately thirty (30) minutes.

Petitioner and her son did not allege either that Respondent had in any way violated, or participated in or condoned the arresting officer's alleged violation of, her son's civil rights, or that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of the Hamilton County Sheriff, his office, or his employees.

Subsequently, FBI Agent Woods reviewed their complaint with the local supervisory FBI Agent in charge of civil rights matters, relating to him that which Petitioner and her son had told him. Based upon the supervisory FBI Agent's said

review of their complaint, and in conformity with his instructions to FBI Agent Woods thereon, FBI Agent Woods closed the FBI file on the matter.

Petitioner's and her son's statements to FBI Agent Woods on or about August 12, 1987, regarding her son's arrest on August 6, 1987, and the alleged civil rights violations stemming therefrom, were considered by the FBI to be a formal complaint.

Respondent was personally unaware of and unfamiliar with the apprehenson and arrest of Petitioner's son on August 6, 1987, until after Petitioner had complained about it to the FBI. Petitioner has never discussed her son's arrest with Respondent.

On or about September 1, 1987, after ascertaining that Petitioner had violated *Sheriff's Rule 1.20*, Respondent approved and issued a written reprimand to Petitioner for said violation.

2) From the Complaint as admitted in the Answer.

Respondent's agents on hearing of the complaint initiated an investigation that was conducted by a Sheriff's detective. In addition to ascertaining the facts, the detective concluded in a report of August 19, 1987, that Petitioner demonstrated a lack of professionalism by violating *Sheriff's Rule 1.20* which provides that "Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor." Petitioner was then recommended for disciplinary action.

Thereafter on August 26, 1987 Petitioner was recommended to receive an official reprimand which was approved by Respondent Leis on September 1, 1987.

3) **From Paragraphs 2, 4, 5 and 6 of the Stipulation of Facts for Cross-Motions for Summary Judgment.**

It is Respondent's position that the policy reasons and objectives underlying *Sheriff's Rule 1.20* are the maintenance of strict discipline, high morale, first-rate job competence, and a unified effort at public service among all Sheriff's Office employees, and thereby earning, projecting and maintaining a well-deserved positive public image of the Sheriff's Office and employees.

Petitioner's typical duties include searching incoming female detainees, taking fingerprints, checking arrest records in computer files, and administrative tasks such as completing the paperwork for processing detainees, and filling out other forms.

Petitioner does not have any policy-making role in the Sheriff's Office, nor does she have a public contact role other than answering routine phone calls. She refers any callers asking policy-related questions to the appropriate supervisor.

Petitioner does not represent the Sheriff's Office or Hamilton County in its relations with the press. She does not have a close working relationship with Respondent Sheriff Simon Leis, nor does she have access to confidential Sheriff's Office information.

While the foregoing represents the sum-total of the facts stipulated to by the parties as the basis for summary judgment herein, it must be emphasized that the stipulation of facts sets forth the policy reasons and objectives underlying *Sheriff's Rule 1.20.* Despite Petitioner's assertions to the contrary, and as both lower courts recognized, Petitioner's uncontroverted violation of this rule under the particular circumstances of this case had, by definition, an adverse impact upon the discipline, morale, competence and unified effort at public service which the rule was designed to promote.

B. HISTORY OF PROCEEDINGS AND FEDERAL QUESTIONS RAISED BY PETITIONER.

Petitioner filed her within lawsuit in the United States District Court for the Southern District of Ohio, Western Division, on September 22, 1987, invoking federal jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and claiming that Respondent violated her rights under the First Amendment to the United States Constitution.

On January 4, 1989, the district court denied Petitioner's motion for summary judgment and granted Respondent's motion for summary judgment, the cross-motions having been based upon a stipulated record. The district court's opinion and order is reprinted in the appendix to the petition, at p. 6a.

Petitioner filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. In her brief, she presented the following arguments involving federal questions:

A. **In the absence of any evidence of disruption or adverse effect on governmental operations a governmental employer has not demonstrated a state interest that would justify the suppression of an employee's communication on a matter of public concern.**

B. **Sheriff's Rule 1.20 is unconstitutionally overbroad.**

On August 31, 1988, following full briefing and oral argument by the parties, the Court of Appeals affirmed the district court's decision in an opinion specifically designated by the Court of Appeals as "NOT RECOMMENDED FOR PUBLICATION." Said opinion is reprinted in the Appendix to the Petition, at p. 1a.

REASONS FOR DENYING THE WRIT

INTRODUCTION

It must be emphasized at the outset that this is a case in which neither the material facts underlying the controversy, nor the propriety of the application of the summary judgment process, are open to question:

> "The parties in the above case hereby stipulate the following facts and further stipulate that there are no other material facts that are in dispute and that summary judgment is appropriate. . . ." (Stipulation of Facts for Cross-Motions for Summary Judgment, opening paragraph.)

Thus, the proper standard for review for this Court is limited to whether or not the proper application of current relevant case law to the stipulated facts of this case supports the district court's ultimate grant of summary judgment in favor of Respondent, and the Court of Appeals' affirmance thereof.

I. THE PROPER APPLICATION OF THE CURRENT RELEVANT CASE LAW OF THIS COURT AND OF OTHER UNITED STATES COURTS OF APPEALS SUPPORTS THE DISTRICT COURT'S ULTIMATE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, AND THE COURT OF APPEALS' AFFIRMANCE THEREOF.

The lower courts' ultimate decisions in this matter, granting and affirming summary judgment for Respondent, reach the legally correct resolution of the controversy. However, while Respondent adopts both lower court decisions, incorporates them herein by reference, and advances the reasoning therein as proper and sufficient grounds for denying the Writ, Respondent submits that the granting and affirming of summary judgment in his favor were both legally mandated for a reason not relied upon by either lower court; namely, the

simple fact that Petitioner's complaints to the FBI did not address a "matter of public concern," and thus her complaints were not properly subject to First Amendment protection, and the reprimand she received for making them was not properly subject to judicial review by the district court.

Petitioner's entire position in the first part of her motion for summary judgment and her subsequent appeals is founded upon her assertion that her complaints to the FBI address a "matter of public concern" as that term has been defined by the relevant case law, and therefore that her complaints are entitled to First Amendment protection.

This crucial "threshold question" is totally unsupported, both by the foregoing stipulated facts and by the relevant case law, and, as will be demonstrated herein, Petitioner's cited authorities are either inapposite, or they support precisely the opposite conclusion. Thus, it becomes obvious both that Petitioner was not entitled to judgment below, as a matter of law or otherwise, and that Respondent Leis was entitled to judgment below as a matter of law.

It must at this point be noted and emphasized that, although the district court did indeed find as a matter of law that Petitioner's complaints to the FBI addressed a matter of public concern, this Court has the "constitutional obligation to assure that the record supports this conclusion. . . ."; "[. . . this Court is] 'compelled to examine [for itself] the statements in issue and the circumstances under which they [were] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' " *Rankin* v. *McPhereson*, 483 U.S. 378, 386, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987), citing *Connick* v. *Myers*, 461 U.S. 138, 105, n. 10, 103 S.Ct. 1684, 1692, n. 10, 75 L.Ed.2d 708 (1983), quoting *Pennekamp* v. *Florida*, 327 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted); see also *Rankin*, 107 S.Ct., at 2987, n. 9. And, it is beyond dispute that resolution of the ultimate issue herein —

whether the speech is protected — is a question of law. *Id.*, citing *Connick*, 461 U.S., at 148, n. 7, 103 S.Ct., at 1690, n. 7.

The authorities which control the case at bar are *Connick*, *supra*, and its progeny, including the recent case of *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1987).

This Court in *Connick* defined its task by referring to the case of *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968):

> "Our task, as we defined it in *Pickering*, is to seek 'a balance between the interests of the [employee], as a citizen, in *commenting upon matters of public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' 391 U.S., at 568. . . ." (Emphasis added.)

Connick, 461 U.S., at 142. However, in *Connick*, as Petitioner correctly pointed out to the district court, this Court turned the "public concern" element of the *Pickering* formulation into a threshold requirement:

> "if [a public employee's speech] . . . cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [a court] . . . to scrutinize the reasons for [the employee's] discharge." 461 U.S. at 146 (footnote omitted.)

As Petitioner correctly noted, the *Connick* Court held that the balancing of interests required by the *Pickering* decision should be done only if the public employee's speech meets this threshold requirement of constituting speech on a matter of public concern.

The *Connick* Court went on to state unequivocally:

> ". . . When employee expression cannot be fairly considered as relating to any matter of political, social, or

other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."

461 U.S. at 146 (citations omitted.)

". . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior . . .

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. . . ."

461 U.S. at 147, 148 (citation and footnote omitted. Emphasis added.)

In *Garvie* v. *Jackson*, *supra*, the Sixth Circuit Court of Appeals recently characterized *Pickering* and *Connick* in the following terms, and applied them accordingly:

". . . *Pickering* and *Connick* establish that a public employer may not *dismiss* an employee *based the employee's speech on matters that concern the public, rather than the personal interest of the speaker*, unless the employer's interest in efficient operation outweighs the employee's interest in speaking freely. . . .

> *Connick* made clear that not all criticisms directed at a public official 'would plant the seed of a constitutional case.' 461 U.S. at 149 . . ." (Emphasis added.)
>
> 845 F.2d, at 651.

It must also be emphasized that this Court wrote, after *Connick*, that:

> ". . . Statements made by public employees in their employment capacity *and not touching on matters of public concern* may be considered unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 504 n. 22 (1984). (Emphasis added.)

A review of the content, form and context of Petitioner's complaints to the FBI, as revealed by the stipulated record herein, and in light of the *Connick* decision, clearly demonstrates that Petitioner's complaints do not address a matter of public concern.

A look at the stipulated facts of this case, as quoted on pages 4-8 of this Brief, shows quite clearly the content of Petitioner's subject complaints to the FBI. Those paragraphs demonstrate unequivocally that Petitioner's only complaints to the FBI were that Patrol Officer Fieler, the deputy sheriff who arrested her son on August 6, 1987, violated her son's civil rights during that particular arrest process. That is the total sum and substance of Petitioner's complaints to the FBI.

Next, regarding the form of Petitioner's complaints, our record irrefutably demonstrates that she complained to only two (2) people about her son's arrest: FBI Agents Lichtenfeld and Woods. Respondent submits that her complaints to Agents Lichtenfeld and Woods clearly did not constitute "public" statements, and that there is nothing else in our record which would support either the conclusion that she ever intended her complaints to the FBI to be made public, or

that she herself ever made her complaints public. Thus, from their very form, it is obvious that Petitioner herself did not regard her complaints about her son's arrest as being matters for the public to be concerned about. And likewise, as the stipulated facts make readily apparent, the FBI also did not believe her complaints to be matters of public concern.

Turning to the last element, the context of Petitioner's complaints to the FBI, Respondent submits that the stipulated facts clearly demonstrate that the Petitioner was complaining to the FBI not as a "citizen" regarding a "matter of public concern," but merely as a mother and a deputy sheriff about a purely personal, employment-related concern: the allegedly improper arrest procedures employed by a fellow deputy sheriff against Petitioner's then-minor son, and what she believed to be the resulting violation of her son's civil rights. The arrest of her son at 1:50 a.m. on August 6, 1987, is the complete context in which Petitioner's complaints to the FBI arose.

Equally important, however, is what Petitioner did *not* allege or complain about to the FBI. First and foremost, the stipulated facts demonstrate uncontrovertibly that she did not accuse Respondent, any of his command or administrative personnel, or any other Hamilton County official, of any misconduct of any type whatsoever. She did not even accuse Respondent or anyone else of condoning Patrol Officer Fieler's allegedly improper arrest of her son. Indeed, she acknowledges that Respondent was personally unaware of and unfamiliar with the arrest of her son until after she made her complaints to the FBI.

Next, it must be noted and emphasized that Petitioner did not complain that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of Respondent, his office or his employees.

Lastly, because of the legal authorities Petitioner cites in support of her position, it must be noted that she made absolutely no allegations whatsoever against Respondent or anyone else regarding sexual preferences, graft, political corruption, cover-ups of committed crimes, fraudulent billings or expenditures, mismanagement of public funds, purposeful unlawful discrimination, or of any other criminal activity and/or social or fiscal wrongdoing.

In short, Petitioner alleged absolutely nothing to the FBI concerning Respondent, as well as alleging nothing that indicated any concern on her part that such an allegedly improper arrest procedure was an ongoing threat to the public, or that there were any other potential threats to the public welfare from Respondent, his office, his employees, or from any Hamilton County officials. Rather, Petitioner made purely personal, employment-related complaints, both as a mother and as a trained, experienced deputy sheriff, about a specific, particular, "one-shot" episode involving her minor son and a fellow employee/professional colleague of hers. This is clearly not the stuff of which "public concern" is made, and none of Petitioner's cited authorities support her contention or the district court's finding that it is.

In addition to *Connick* and *Bose Corp.*, Petitioner cites the following cases to support that her complaints to the FBI address a "matter of public concern": *McKinley* v. *City of Elroy*, 705 F.2d 1110 (9th Cir. 1983); *Rowland* v. *Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *O'Brien* v. *Town of Calendonia*, 748 F.2d 403 (7th Cir. 1984); *Marohnic* v. *Walker*, 800 F.2d 613 (6th Cir. 1986); *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986); *Ratliff* v. *Wellington Exempted Village School Bd. of Educ.*, 820 F.2d 792 (6th Cir. 1987); *Donohue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54 (2nd Cir. 1987); *Solomon* v. *Royal Oak Tp.*, 842 F.2d 862 (6th Cir. 1988) and *Rode* v. *Dellarciprete*, 1988 U.S.App. LEXIS 5642 (3rd Cir., April 28, 1988). While all of these cases contain convenient statements of law which

seem at first glance to support Petitioner's position herein, Respondent submits that each case arose from facts so far different and removed from the facts of the case at bar that the holdings in those cases have absolutely no application herein. *Rowland* arose from a nontenured high school guidance counselor's expression of her bisexual orientation to fellow school employees and supervisors. The Sixth Circuit Court of Appeals held that her expression was made as an employee, in a non-public manner, and upon a matter of only personal interest — not as a citizen upon a matter of public concern — and thus it was not protected speech. Thus, *Rowland* more closely supports Respondent's position herein than Petitioner's. *McKinley* and *Ratliff* both arose from public employees' public remarks criticizing their public employer's mismanagement of public money. Respondent does not submit that either of these decisions is wrong, but he does submit that the facts which gave rise to both decisions bear no resemblance whatever to the facts of the case at bar. Likewise, *O'Brien*, *Marohnic*, *McMurphy* and *Solomon* all involved public employees' public allegations of *serious criminal activity by their public employers*: graft and corruption in *O'Brien*; fraudulent billing in *Marohnic*; official corruption and cover-ups in *McMurphy*; and political corruption in *Solomon*. Once again, Respondent does not disagree with the holdings in these cases, but states simply that the facts on which they are based render them completely inapposite herein.

Lastly, the *Donohue* and *Rode* decisions were based upon public employees' public allegations that their respective public employers purposefully engaged in unlawful gender-based or retaliatory discrimination, and also, in *Donohue*, violation of the Freedom of Information Act. Once again, as Petitioner made no allegations whatever against Respondent or his command and administrative staff, much less any involving purposeful unlawful discrimination or violation of other law, both *Donohue* and *Rode* have no application herein.

Thus, all authority cited by Petitioner for the proposition that her complaints to the FBI address a matter of "public concern" is either inapposite or supports just the opposite conclusion.

Based upon what the stipulated evidence discloses about the content, form and context of Petitioner's complaints to the FBI, and in view of this Court's holdings in *Connick* and *Bose Corp., supra*, it is apparent that Petitioner's complaints to the FBI do not address a matter of public concern, do not present a First Amendment claim properly subject to judicial review, and thus do not entitle her to judgment herein as a matter of law. Such being the case, it is equally apparent that the proper application of the current relevant case law of this Court and of other United States Courts of Appeals supports the district court's ultimate grant of summary judgment in favor of Respondent, and the Court of Appeals' affirmance thereof.

II. THE WITHIN UNPUBLISHED DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONSTITUTE BINDING LEGAL PRECEDENT FOR THE COURTS WITHIN THAT CIRCUIT, AND THUS IT IS NOT AN INCURSION INTO THE AREA OF PROTECTED SPEECH BY PUBLIC EMPLOYEES.

Rule 24(c) of the *Rules of the United States Court of Appeals for the Sixth Circuit*, set forth hereinabove, makes it clear that citation of an unpublished decision of that court, in that court and in the district courts within that circuit, is disfavored; that the binding effect of an unpublished decision is limited to the parties thereto; and thus that an unpublished decision such as the one on appeal herein may be considered, at best, only as persuasive argument, and not as binding precedent.

Therefore, it is apparent that the within unpublished decision of the Court of Appeals does not represent "a very

substantial incursion into what had been an area of protected speech by public employees," as claimed by Petitioner (Petition, p. 13).

III. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT.

Simply put, this case does not involve any question requiring the exercise of this Court's guidance, despite the claims to the contrary in the Petition. The results reached by both lower courts are correct, and therefore this matter does not warrant this Court's attention.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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